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**BEFORE THE EXECUTIVE DIRECTOR
UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER QUALITY**

In the Matter of: U.S. Oil Sands PR Spring	:	
Mine, Mine Expansion and Ground Water	:	REQUEST FOR
Discharge Permit-by-Rule	:	AGENCY ACTION
	:	
	:	February 17, 2015

1. Pursuant to Utah Code §§ 19-1-301.5 and 63G-4-201(1)(b), (3) and Utah Admin. Code R305-7-203, Living Rivers hereby files this Request for Agency Action with Amanda Smith, Executive Director of the Utah Department of Environmental Quality and Walt Baker, Director of the Utah Division of Water Quality.¹

2. This Request for Agency Action seeks review and remand of the Director's decision not to undertake a permitting process open to the public and not to require U.S. Oil Sands (Oil Sands) to obtain a Ground Water Discharge Permit (GWDP) in response to the company's notification to the Director that it intends to significantly increase the size, scope and impact of its PR Spring mining operation. The Director had previously determined that the PR Spring mine qualified for a permit-by-rule (PBR) and has stated that in spite of a four-fold increase in

¹ The Director of the Utah Division of Water Quality and the Division of Water Quality are collectively referred to as "the Director."

the size of the mine pits, an increase in production and an increase in the mine footprint by over a hundred acres, that the mine still qualifies for a PBR.

3. While the Utah Division of Oil, Gas and Mining (DOGM) has deemed the change in operation proposed by Oil Sands to be significant enough to require the reopening of the company's mining permit and to demand that the company submit a Revised Notice of Intention to Commence Large Mining Operations (Revised NOI), which will be subject to public notice and comment, the Director informed Living Rivers on January 15, 2015, via email, that while he was aware of the changes outlined in the Revised NOI, he did not consider the changes substantial enough to prompt him to rescind his PBR determination. The Director made this decision without public notice or comment. Had the Director opened his decision to public notice and comment, Living Rivers would have participated in that permitting process and would have submitted to the Director during that process the information contained in the documents attached as exhibits to this Request for Agency Action.

Agency File Name and Date of Mailing

4. This Request for Agency Action seeks review, revocation and remand of the PBR issued to Oil Sands for its proposal to revise the design and expand the footprint of its mine and mining activities ("mine expansion") and/or the decision that the mine expansion was encompassed or covered by a PBR, existing or otherwise, and, *inter alia*, asks that the Director undertake a permitting process, subject to public notice and comment and administrative review, relative to the mine expansion and compel Oil Sands to obtain a GWDP for that project. There is no agency file number associated with the PBR.

5. This Request for Agency Action was timely hand-delivered to the Director of the Division of Water Quality and the Administrative Proceedings Record Officer on February 17,

2015. Utah Code §§ 19-1-301.5(6) & (7)(b); Utah Admin. Code R305-7-203(5).

Legal Authority and Jurisdiction

6. The Executive Director of the Utah Department of Environmental Quality (Executive Director) has jurisdiction over this Request for Agency Action pursuant to Utah Code Ann. § 19-1-301.5 and § 63G-4-101, *et seq.* The legal authority for this Request for Agency Action is found in the Utah Constitution, and the Utah Water Quality Act, Utah Code 19-5-101 *et seq.*, and its implementing regulations, Utah Admin. Code Title R317. This Request for Agency Action adds additional legal authority for Living Rivers' claims.

Statement of Relief and Action

7. Living Rivers requests an order setting aside, vacating and/or voiding the PR Spring PBR determination related to the mine expansion; ordering the Director to undertake a permit proceeding open to the public and to require Oil Sands to obtain a GWDP; ordering the Director to otherwise fulfill his obligations under state law; and/or directing that the permit be remanded with instructions that the Director objectively and independently review the data and analysis provided by Living Rivers with instructions that any determinations flowing from this review be supported by substantial evidence and documented in the record. Living Rivers requests any other or additional remedy the Executive Director deems appropriate.

Statement of Facts and Reasons

8. Representing its members, Living Rivers brings this Request for Agency Action, challenging the Director's refusal to undertake a permitting process open to the public and to compel Oil Sands to obtain a GWDP for the expansion of its PR Spring mine, located on the border between Uintah and Grand counties. As specified below, in failing to undertake a permitting process relative to the mine expansion, in determining that the mine expansion was

encompassed by a PBR and in failing to require the company to obtain a GWDP, the Director has failed in his legal obligations under the Utah Water Quality Act and the Ground Water Quality Protection Regulations. As a result, Living Rivers asks that the PBR be revoked and remanded, and that the Director undertake a permitting process open to public notice and comment and that he compel the company to obtain a GWDP and properly monitor area springs for contamination from its mining operation. Living Rivers further asks that the Director be ordered to comply with and to properly apply the Utah Ground Water Quality Protection Regulations relative to the permit and the mine expansion and to protect Waters of the State, including local ground water and surface water and the environment from contamination, from the discharge of pollutants and from any pollution resulting from the contamination of area ground water.

Permitting Background

9. The first available record relating to the PR Spring mine is a letter from the Director to Oil Sands (formally Earth Energy Resources) on October 14, 2005. Exhibit A, attached. In that letter, the Director noted that until Oil Sands provided additional information related to its operation, the company would need to store its tailings from its mining operation on an impermeable liner.
10. On December 15, 2005, the Director sent a follow-up letter to Oil Sands referring to some preliminary tests that the company had submitted, noting that disposal of the tailings according to procedures approved by DOGM should protect ground water, and noting that if Oil Sands decided to move beyond the pilot project, more extensive testing would be required. Exhibit B, attached.
11. On February 21, 2008, Oil Sands submitted what it refers to as a "Ground Water Discharge Permit-by-Rule Demonstration" associated with its proposal to expand to commercial-

scale operation. Exhibit C, attached. The Demonstration addressed a variety of factors, including environmental setting, operation description, potential for contaminant release, residual characteristics, and hydrogeologic setting. *Id.* at 2-17.

12. In response to the Demonstration, on March 4, 2008, the Director sent a letter to Oil Sands stating that after his review of the information submitted by the company that he had determined that the mine would have a *de minimis* effect on ground water and that the then-proposed operations qualified for PBR status under Utah Admin. Code R317-6-6.2(A)(25). Exhibit D, attached.

13. On February 8, 2011, Oil Sands informed the Director of a number of changes that the company intended to make to its proposed operation. Exhibit E, attached. On February 15, 2011, the Director informed the company that the changes did not alter his earlier PBR determination. Exhibit F, attached.

14. On March 16, 2011, Living Rivers timely filed a Request for Agency Action challenging the Director's 2011 PBR determination.

15. After an administrative hearing on the merits, the Utah Water Quality Board issued an order on November 1, 2012, affirming the Director's 2011 decision and denying the relief sought by Living Rivers in its 2011 Request for Agency Action.

16. On November 29, 2012, Living Rivers timely filed a Petition for Review of the Board's order to the Utah Court of Appeals. The Court of Appeals subsequently certified the appeal to the Utah Supreme Court.

17. Following briefing and oral arguments, on June 24, 2014, the Utah Supreme Court issued an opinion dismissing Living Rivers' petition as untimely. As a basis for its dismissal, the Court stated that Living Rivers' petition focused on arguments that addressed the legal and factual

basis for the Director's 2008 decision, rather than his 2011 decision. Because Living Rivers had not challenged the 2008 decision within the required 30-day time period, the Court stated that it lacked jurisdiction to hear the appeal.

18. On July 8, 2014, Living Rivers petitioned the Utah Supreme Court to reconsider its dismissal because, *inter alia*, no public notice was given of the 2008 determination, and therefore it would have been impossible for Living Rivers to have filed such a challenge within that time period. On February 13, 2015, the Court denied that petition.

Additional Background

19. In September 2013, Dr. William Johnson of the University of Utah met with the Director to discuss his report entitled "Hydrochemical Data from Perennial Springs in the PR Spring Area of the Southern Uintah Basin, July 2013." Exhibit G, attached. The Director promised to review the document and give Living Rivers a "technical response" to that report. However, that response was never produced.

20. On January 29, 2014, Dr. Johnson submitted a manuscript entitled "Hydrogeochemistry of Perennial Springs on the Tavaputs Plateau, Utah, USA: Significance to Tar Sand Mining, Processing, and Disposal on Adjacent Ridges" for publication in *Science of the Total Environment*. Exhibit H, attached. That manuscript includes further evidence of the connection of the area of the PR Spring mine site to area perennial springs. Dr. Johnson separately provided a copy of that manuscript to the Director.

21. On August 18, 2014, Oil Sands submitted the results of Synthetic Precipitation Leaching Procedure (SPLP) testing of its process wastes to the Director. Exhibit I, attached. On October 7, 2014, the Director responded to Oil Sands' submission by issuing a letter stating, *inter alia*, that the test results show low levels of total gasoline and diesel range organics. Exhibit J,

attached. In his expert analysis, Dr. Johnson refutes the assertion that the test results show low levels of these compounds, claiming that the “low” designation for organic compounds is arbitrary and does not reflect the fact that the organic compounds in question are regulated and deemed significant at concentrations that are thousands of times lower than those measured in the Oil Sands SPLP test. Exhibit K, attached.

22. On November 21, 2014, Oil Sands submitted the Revised NOI to DOGM, proposing to substantially expand the size and scope of its operation and redesign and revamp its operations. Exhibit L, attached. The Director claims to be familiar with the details of the proposed expansion, but has determined that even though the expansion of the mine operations and affected area and the redesign of the operations are significant, the mine continues to qualify for PBR status. Exhibit M, attached.

Dr. Johnson Provided the Director with Significant Evidence that the Area of the Mine is a Recharge Zone for the Seeps and Springs in Main Canyon.²

23. In September 2013, Dr. Johnson met with the Director to discuss the results of the professor’s extensive study of the possible hydrologic connection between the area of the PR Spring mine and the perennial springs located below the mine in Main Canyon. Exhibit G. In that report, Dr. Johnson established that there exists a ground water flow system that is recharged on the ridge tops and that flows to springs in adjacent canyons. *Id.* at 3. Dr. Johnson further found that due to this connection, there is concern that, if mitigation measures are not implemented to protect ground, the mining/processing/disposal activities at the PR Spring mine will impair the water quality of these seeps and springs. *Id.* No evidence of any follow up actions on the part of the Director to Dr. Johnson’s information exists in the record.

² Every paragraph and every statement in this Request for Agency Action is incorporated by and referenced into any and all particular causes of action herein.

24. The Utah Legislature made it clear that “all” Waters of the State, including “all” accumulations of ground water, must be protected from contamination. Specifically, the Water Quality Act defines Waters of the State as:

All streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and **all other bodies or accumulations of water, surface and underground**, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of this state.

Utah Code Ann. § 19-5-102(23)(a) (emphasis added). The Act further specifies that “it is unlawful for any person to discharge a pollutant into **waters of the state**...or to place...any wastes in a location where there is probable cause to believe it will cause pollution.” Utah Code Ann. § 19-5-107(1)(a) (emphasis added).

25. A discharge “means the addition of any pollutant to **any** waters of the state,” Utah Code Ann. § 19-5-102(7) (emphasis added), and pollution is defined as “any man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of **any** waters of the state[.]” Utah Code Ann. § 19-5-102(13) (emphasis added).

26. In a personal communication with the attorney for Living Rivers, the attorney for the Director promised that the Director would issue a “technical response” to Dr. Johnson’s report. The Director has yet to produce that response.

27. In spite of the Director’s apparent lack of interest in Dr. Johnson’s study, Dr. Johnson has continued to conduct testing of water emanating from perennial springs near and below the mine to confirm any hydrologic connection between the springs and the mine. The results of that continued study are included in the manuscript that Dr. Johnson submitted to *Science of the Total Environment*. Exhibit H.

28. In that manuscript, Dr. Johnson and his team concluded that the local recharge for area

perennial springs, specifically the springs in Main Canyon, must include recharge from surrounding ridges, in addition to recharge through the alluvial surface. *Id.* at 17 (22/45 in PDF). Dr. Johnson based his conclusions on a number of factors, including observed ground water temperature, the observed progression with elevation of specific conductance, alkalinity, Sr concentration, $^{87}\text{Sr}/^{86}\text{Sr}$ ratio, ^{18}O , and ^3H concentrations. *Id.* at 17-18. He further concludes that the hydrogeochemical parameters observed in spring versus alluvium water indicate that the perennial springs are not derived solely from alluvial water and must receive water from the surrounding ridges, including the area of the mine. *Id.* at 18; *see also* Exhibit K at 1 (The results of the study “strongly indicated that the springs are recharged locally, and this recharge largely occurs on the surrounding ridges of the plateau, based on measured ages, temperatures, precipitation rates, and progressions in multiple hydrogeochemical parameters with elevation.”)

29. Given that a primary premise for his determination that the mine will have a *de minimis* potential effect on ground water quality is the Director’s conclusion that the nearest ground water source that could be impacted from the mine is approximately 2,000 feet below the surface, Exhibit D at 2, and given that Dr. Johnson’s study specifically refutes this conclusion, the Director is obligated to abide by the Water Quality Act and Utah law, to rescind Oil Sands’ PBR for the PR Spring mine, revise his determination that mine expansion qualifies for a PBR, undertake a permitting process open to the public and require the company to obtain a GWDP. Because he has not, the Director’s decision is not supported by the record and is arbitrary, capricious and a violation of the law.

The Division of Oil Gas and Mining Recognizes the Connection Between the Site Impacted by the Expansion and the Springs in Main Canyon.

30. With regard to the impacts to groundwater systems in its review of Oil Sands’ proposed expansion, DOGM stated:

The narrative notes that no springs or seeps were identified within the Phase 1 project area during a May 2014 reconnaissance with personnel from Utah OGM and DWQ, and the Utah Geological Survey. While this is true, the field reconnaissance did identify springs and seeps flowing within Long Shot Canyon..., which is part of the Main Canyon watershed. The U.S. Geological Survey has mapped these springs, along with several others within the Main Canyon watershed. Access restrictions prevented the group from conducting a more detailed survey of the other mapped seeps and springs within the watershed. Because the Phase 1 mining area is part of the Main Canyon watershed, it is necessary to evaluate any impacts from the mining operation, which is why a baseline characterization of the springs and seeps is needed. Please include a baseline characterization spring and seep survey to begin in the spring of 2015.

Exhibit N, attached.

31. This statement by a sister state agency validates observations made and conclusions reached in Dr. Johnson's study, namely that there is a hydrologic connection between the proposed expanded mine site and the seeps and springs in Main Canyon.

32. Because the Director has ignored information from multiple sources indicating that a hydrologic connection exists between the expanded mine site and the Main Canyon seeps and springs, and because he has refused to rescind the PBR, because he has determined that the mine expansion qualifies for a PBR, because he has failed to undertake a permitting process open to the public and because he has failed to require the company to obtain a GWDP, the Director's actions and decisions are not supported by the record and are arbitrary, capricious and in violation of the law.

The Existing Record Lacks Necessary Documentation on Baseline Ground Water Resources and on Oil Sands' Plan to Monitor Impacts to Ground Water from its Mining Activity.

33. By determining that the mine expansion qualifies for a PBR, by refusing to rescind Oil Sands' PBR and by failing to require the company to obtain a GWDP for its mine expansion, the Director has denied the public an opportunity to submit evidence and to comment on record and legal deficiencies associated with the Director's actions relating to the PR Spring mine

expansion. As denoted in Mr. Elliott Lips' review of the Revised NOI, in a number of ways, the record lacks necessary documentation to support a permitting decision and/or a determination that the mine expansion qualified for a PBR. Exhibit O, attached.

34. For instance, Mr. Lips notes that Oil Sands limits its discussion in the Revised NOI to a very narrow physical area – the Phase 1 project area – thus failing to document how the area of the mine fits into the hydrogeology of the surrounding area. *Id.* at 2. He further notes that Oil Sands has intentionally removed from the record earlier references to a number of seeps and springs and the presence of shallow ground water in the area of the mine. *Id.*³

35. Mr. Lips states that Oil Sands also failed to convert a select number of its exploration wells into monitoring wells to prove the presence, or absence, of ground water in the area of the mine expansion. *Id.* at 3. This is the type of monitoring that Living Rivers has advocated for and continues to advocate for as an appropriate measure for the Director to require as part of a GWDP or permitting process.

36. Citing DOGM's reference of the June 2014 site visit in the agency's review of the Revised NOI, Mr. Lips notes that a single visit is insufficient to reach any conclusion regarding whether seeps and springs exist in the area of the mine. *Id.* He notes that Oil Sands has not conducted a comprehensive investigation of the area in order to document the presence of shallow ground water, and that a systematic seep and spring survey is necessary to document where the shallow ground water manifests itself on the surface. *Id.* He notes that this shortcoming is apparent to DOGM based on that agency's comment, cited above, on the need to conduct baseline characterization of the seeps and springs. *Id.* at 4.

37. Finally, Mr. Lips cites the lack of a plan by Oil Sands to monitor nearby existing surface

³ Thus, the Revised NOI also conflicts with, *inter alia*, the DOGM determination cited above.

expressions of ground water given the potential for contamination of ground water from the PR Spring mine. He notes that at each location of an existing seep or spring, the company should conduct quarterly measurements of the flow rate and analysis of ground water quality. *Id.* Additionally, Mr. Lips recommends the inclusion of monitoring wells outside of the disturbed area to detect any changes in water quality or quantity. *Id.*

38. The type of information provided by Mr. Lips is exactly the type of information that the Living Rivers would have submitted had the Director solicited comment from members of the public, had he made the decision to rescind the PBR, had he determined that the mine expansion did not qualify under the PBR and had he required the company to obtain a GWDP and conduct adequate monitoring of area ground water resources. Because he did not, and because the Director refuses to require the company to obtain a GWDP for its mine expansion, the Director's decision not supported by the record and is arbitrary, capricious and a violation of the law.

There is No Basis for the Director's Conclusion that the Results from the SPLP Analysis Conducted by Oil Sands Show Low Levels of Total Gas and Diesel Range Organics.

39. In May, 2014, Oil Sands tested ore from the PR Spring project at its Alberta test facility and subjected both raw ore and processed sands and clay fines to the Synthetic Precipitation Leaching Procedure (SPLP) and Toxicity Characteristic Leaching Procedure (TCLP) tests. *See* August 18, 2014 Oil Sands letter to Mark Novak, Exhibit I. On August 18, 2014, Oil Sands submitted to the Director the results of that analytical testing. On October 7, 2014, the Director sent a letter to Oil Sands stating that, *inter alia*, the results from the SPLP analysis revealed "low" levels of total diesel range organics. *See* Exhibit J at 2. Based on that determination, the Director stated that the test results do not change his earlier decision that disposal of the Oil Sands tailings qualifies for a permit-by-rule under R317-6-6.2(A)(25). The Director goes on to note that the PBR determination "only applies to tailings with similar chemical characteristics

disposed at the PR Spring mine site by burial in the unsaturated zone.” *Id.*

40. First, as pointed out in Dr. Johnson’s study, there is a hydrologic connection between the area of the mine and the springs in nearby canyons, and specifically in Main Canyon. Exhibit H at 17-18. Because such a connection exists, the Director is remiss to rely on burial of the tailings in “the unsaturated zone” beneath the mine to make a PBR determination. The Water Quality Act specifies that “it is unlawful for any person to discharge a pollutant into waters of the state...or to place...any wastes in a location where there is probable cause to believe it will cause pollution.” Utah Code Ann. § 19-5-107(1)(a) (emphasis added).

41. Second, Dr. Johnson has concluded that there is no basis for the Director’s conclusion that the measured gas and diesel range organics concentrations shown in the SPLP tests conducted by Oil Sands on its waste stream are “low.” Exhibit K at 2. Instead, Dr. Johnson states that such concentrations are “extremely high” based on knowledge of organic compound fate, transport and toxicity. *Id.* Dr. Johnson notes that the reason for this conclusion is, *inter alia*, that the compounds have extremely low solubilities in water and many compounds in this class are highly carcinogenic. *Id.*

42. Dr. Johnson further concludes that the lack of detection of specific semi-volatile and volatile compounds in the SPLP leachate is expected because bitumen is the remaining organic material that is expected to exist after processing of the tar sands. *Id.* Dr. Johnson further notes that “[t]he compounds that predominate in bitumen are the non-volatile compounds that include asphaltenes and polycyclic aromatic hydrocarbons among which there are hundreds to thousands of compounds present in the bitumen.” *Id.* (emphasis original). He concludes that the non-detects for specific organic compounds are simply a combination of low solubility in water of any single specific target compound, the likely relative absence of volatile

and semi-volatile compounds in bitumen, and the low QA/QC recoveries for these specific compounds.

43. Specifically, Dr. Johnson notes that the maximum contaminant level (MCL) for benzo(a)pyrene (B(a)P) is 0.2 µg/L because of its demonstrated carcinogenicity. *Id.* at 2. Further, the MCL for benzene is 5 µg/L. However, his review of the SPLP results reveals that the MCL for B(a)P is tens of thousands times lower than the concentrations measured in the SPLP test and the MCL for benzene is thousands of times lower than the concentrations measured. *Id.*

44. Based on this, Dr. Johnson concludes that the Director's "low" designation for organic compounds in the SPLP waters associated with this testing is not supported by the record, is arbitrary and does not reflect the fact that the organic compounds in question are regulated in drinking water standards to concentrations that are thousands of times lower than those measured in the SPLP test. *Id.* at 1.

45. Because of the significant levels of organic compounds contained within the waste stream for the mine, and because of the hydrologic connection between the area of the mine and the springs located below the mine in Main Canyon, the Director's decision that the mine expansion qualifies for a PBR is unsupportable and unlawful. Similarly, in light of these tests, the Director is obligated to rescind the PBR for the mine, initiate a permitting process and require Oil Sands to obtain a GWDP for the mine expansion and adequately monitor ground water quality in area seeps and springs. Because he has not, the Director's decision is not supported by the record and is arbitrary, capricious and a violation of the law.

Requested Relief

46. Each and every paragraph in this Request for Agency Action is referenced and

incorporated into each and every section of this Request for Agency Action. No statement of relief is intended to limit the request for relief stated in any paragraph of this Request for Agency Action and every request for relief is applicable to any specific claim or statement or allegation herein.

47. By determining that the mine expansion qualified for a PBR, by refusing to rescind the PBR for the mine expansion, by failing to initiate a permit proceeding and by refusing to compel Oil Sands to obtain a GWDP, the Director is ignoring significant credible data from multiple sources that shows a hydrologic connection between the area of the mine and area springs, specifically those in Main Canyon.

48. The Director failed to acknowledge that ground water resources as defined by Utah law and in the Water Quality Act and its implementing regulations could be impacted by the mine operations and mine expansion and therefore the Director has failed to adequately protect that ground water. The Director has stated and/or implied that a basis for his PBR determination is that ground water as protected by the Water Quality Act does not exist above approximately 2,000 feet below the surface. This premise is in direct contradiction to new evidence and evidence that relates directly to the mine expansion proposal that had been submitted to the Director and that he has at his disposal, but that he refuses to acknowledge and address. Because of this, the Director is, as a matter of law and a matter of fact, improperly limiting protection of this ground water by authorizing the release of contaminants at the mine site and from the mine expansion in violation of the law and by failing to address, mitigate and minimize or prohibit the release of pollutants into ground water and Waters of the State.

49. Further, in determining that the mine expansion qualifies for a PBR, by failing to initiate a permitting process open to the public and by not requiring the company to obtain a GWDP, the

Director has failed to consider information submitted by the public and to require the suite of monitoring and testing necessary to ensure protection of Waters of the State.

50. Because of his unsupported conclusion that tailings from the mine that will be deposited in an unsaturated zone beneath the mine will have a *de minimis* effect on ground water quality, the Director has concluded, improperly and without basis in the record, that the mine expansion qualifies for a PBR and that ground water monitoring in the area of the mine is unnecessary. Therefore, the Director has incorrectly concluded that there is no need for the agency to require the company to monitor or protect these ground water resources.

51. The Director also improperly concluded that SPLP testing conducted by Oil Sands revealed low levels of total gasoline and diesel range organics in the company's waste stream. As Dr. Johnson stated in his testimony, these levels indicate concentrations of various organic compounds that are thousands of times higher than the maximum contaminant levels in drinking water. Because of that, Dr. Johnson concludes and the record indicates that the Director's conclusions based on those tests are arbitrary and do not reflect the true impact of the test results. By the same token, the Director's determination that the mine expansion qualifies for a PBR, refusal to rescind the PBR for the mine expansion, failure to initiate a permit proceeding and refusal to compel Oil Sands to obtain a GWDP are not supported by the record, are arbitrary and capricious and a violation of the law.

52. Dr. Johnson states that all existing and recent hydrogeochemical data from the area strongly indicate that the ridges, including the area of the mine, are the recharge area for perennial springs in nearby Main and PR Canyons, and that the "low" designation for the organic compounds in SPLP water is arbitrary and does not reflect the fact that the organic compounds in question are regulated to concentrations that are thousands of times lower than those measured in

the SPLP tests. These facts and expert conclusions indicate that the Director's assessment that the mine poses a *de minimis* effect to area ground water is incorrect and that the facts warrant, at a minimum, initiation of a permitting process and analysis of the potential impact of the mine expansion to perennial springs in the area. Further, in light of these facts and unaddressed expert conclusions, the Director's determination that the mine expansion qualifies for a PBR, refusal to rescind the PBR for the mine expansion, failure to initiate a permit proceeding and refusal to compel Oil Sands to obtain a GWDP are not supported by the record, are arbitrary and capricious and a violation of the law.

53. Based on the above and the other deficiencies identified throughout this Request for Agency Action, Living Rivers asks that the Director's decision that the mine expansion qualifies for a PBR be overturned, that the PBR for the mine expansion be immediately revoked and remanded, and that the Director initiate a permitting process and compel the company to obtain a GWDP. Further, Living Rivers seeks an order directing the Director to comply with and to properly apply the Utah Water Quality Act and Ground Water Quality Protection Regulations relative to any permitting decision, any permit issued to U.S. Oil Sands and/or decision relative to the mine expansion proposal and to protect Waters of the State, including local ground water, surface water and the environment from contamination, from the discharge of pollutants and from any pollution resulting from the contamination of area ground water.

Notice

On **February 17, 2015**, copies of this Request for Agency Action were **hand delivered** to:

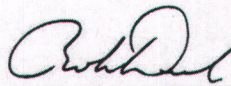
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and served by mail, on:

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Respectfully submitted this 17th day of February, 2015.



ROB DUBUC
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Attorneys for Living Rivers

Exhibit List

Exhibit A – October 2005 Letter to Oil Sands
Exhibit B – December 2005 Letter to Oil Sands
Exhibit C – February 2008 “Demonstration”
Exhibit D – March 2008 PBR Determination
Exhibit E – February 2011 Changes to Operation
Exhibit F – February 2011 PBR Determination
Exhibit G – Letter to Dr. Johnson and Initial Hydrologic Connection Report
Exhibit H – Science of the Total Environment Manuscript
Exhibit I – August 2014 Oil Sands Submission of SPLP Testing
Exhibit J – October 2014 Letter from Director on Test Results

Exhibit K – Dr. Johnson’s February 2015 Testimony
Exhibit L – Revised NOI
Exhibit M – Email from DWQ re: No Change to PBR
Exhibit N – Portion of DOGM Initial Review of Revised NOI
Exhibit O – Elliott Lips Report

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Pursuant to Utah Code § 63G-4-207, Utah Admin. Code R305-7-204, Living Rivers respectfully petitions to intervene in the above captioned matter. In support of this petition, Living Rivers attaches the Declaration of John Weisheit, incorporates its Request for Agency Action filed herewith, and states the following:

1. *Identity of Petitioner*

Living Rivers is a non-profit corporation headquartered in Moab, Utah, dedicated to the preservation, protection, and restoration of rivers and watersheds in the Colorado Plateau. Living Rivers works to ensure the long-term health and viability of human, animal and plant species, as well as environmental quality threatened by mining operations in the region.

2. *Living Rivers' Interests May Be Substantially Affected by the Instant Proceeding.*

The mining activities associated with the construction and operation of U.S. Oil Sands' (Oil Sands) complex as outlined in the company's Revised Notice of Intention to Commence Large Mining Operations (Revised NOI) for the PR Spring mine has the potential to significantly

impact the relevant area in Uintah and Grand counties in many ways, including by significantly impacting ground water in the area of the mine and the local seeps and springs connected to or affected by that ground water and those aquifers. The Revised NOI was submitted to the Utah Division of Oil, Gas and Mining (DOGM) and the Director of the Division of Water Quality and the Division of Water Quality (collectively "the Director") claim to be familiar with the construction and operational details outlined in that document. In spite of his knowledge of the proposal to revise the design and expand the footprint of its mine and mining activities ("mine expansion"), the Director has stated that the mine still qualifies for permit-by-rule status. As a result of pollutants from the mine being discharged into ground water, and the potential impact of those discharges on area seeps and springs, plant communities and wildlife that depend on these surface manifestations of ground water could be significantly harmed, as could recreationists and area residents who use that water to drink. Further, there is the potential for downstream contamination of surface waters due to storm events.

In addition to being adversely affected by the consequences to ground water and surface water from mine construction and operation, Living Rivers and its members will be harmed because their enjoyment of the area where the mine will be sited will be substantially diminished in a number of significant ways. For example, the industrialization of the landscape, the increase in air pollution, the harassment of wildlife, damage to wildlife habitat, the loss of serenity and destruction of wildlife and native plant communities will all harm Living Rivers and its members. Living Rivers has members and staff who visit the area of the mine on a regular basis and plan to return to the area, and whose enjoyment of the area will be decreased and whose use of the area will be curtailed because of the proposed Oil Sands mining activity and the company's plans to expand its operations. As citizens who actively enjoy the natural landscape

of the area, Living Rivers' staff and members have a substantial interest in safeguarding their health, pursuing their recreational activities and appreciating the natural beauty of the area to be mined. Each of these interests will also be adversely affected by the construction, operation and expansion of the PR Spring mine and the potential that mining activities will result in discharges to ground and surface water.

As outlined in the Revised NOI, Oil Sands has proposed to expand the PR Spring mine from 213 acres to approximately 316 acres and plans to expand the area of its mine pits from 63 acres to 235 acres. Revised NOI at 17. As noted by Dr. William Johnson in his testimony, all hydrogeochemical data from the area strongly indicate that the ridges, including the area of the mine, are recharge zones for perennial springs in Main and PR Canyons. Johnson at 2. Further, the Director's contention that there are "low" concentrations of organic compounds in the company's test results is arbitrary and does not reflect the fact that these compounds are regulated at concentrations that are thousands of times lower than those measured in the synthetic precipitation leaching procedure (SPLP) test. *Id.*

Through this action, Living Rivers seeks review and remand of the Director's decision not to require Oil Sands to obtain a ground water discharge permit (GWDP) in response to the company's notification to the Director that it intends to significantly increase the size, and substantially modify the footprint of its PR Spring mining operation. The Director had previously determined that the PR Spring mine qualified for a permit-by-rule (PBR). Further, Living Rivers seeks an order directing the Director to comply with and to properly apply the Utah Ground Water Quality Protection Regulations relative to the permit and mine expansion proposal and to protect Waters of the State, including local ground water, surface water and the

environment from contamination, from the discharge of pollutants and from any pollution resulting from the contamination of area ground water.

Given that their quality of life, recreational opportunities and aesthetic sensibilities will be harmed by the Oil Sands mining activities and any potential discharges of contaminants and given that the proper application of the law may eliminate or reduce those deleterious consequences, Living Rivers staff and members plainly have a legal interest in ensuring that the Director has fulfilled his legal obligations to address and control pollution from the mine and safeguard their environment, health and wellbeing and the health and wellbeing of Utah's citizens and their environment. Living Rivers staff and members also have a procedural interest in the proper application of a law designed to protect Waters of the State and the environment and will be harmed unless they are able to participate in an adjudication of the propriety of the Director's decision not to require the company to submit a GWDP Application and in the public processes associated with a decision whether or not to issue a GWDP for the mining activities and expansion proposal.

3. *Living Rivers' Statement of Relief*

Living Rivers respectfully submits this petition to intervene to ensure that the Utah Water Quality Act and the Utah Ground Water Quality Protection Regulations are properly and rigorously applied to the proposed expansion of the PR Spring mine as outlined in the Revised NOI. Details of deficiencies of the Director's decision are contained in the Request for Agency Action filed herewith. Living Rivers seeks review and remand of the Director's decision not to require Oil Sands to obtain a GWDP in response to the company's notification to the Director that it intends to significantly increase the size and scope of its PR Spring mining operation. Further, Living Rivers seeks an order directing the Director to comply with and to properly apply the Utah Ground Water Quality Protection Regulations relative to the permit and to protect

Waters of the State, including local ground water, surface water and the environment from contamination, from the discharge of pollutants and from any pollution resulting from the contamination of area ground water. The Request for Agency Action further specifies the relief Living Rivers seeks.

This intervention will not adversely affect any parties' legal rights and interests, and instead will best serve the interests of justice and the health of the community. Indeed, unless Living Rivers is permitted to challenge the Director's decision not to require Oil Sands to obtain a GWDP for the PR Spring mine expansion and seek relief from this Tribunal, there will be no adjudication of the propriety of the Director's decision and the decision will not be subject to any type of administrative review. Preventing Petitioners from seeking this review would also violate the Utah Constitution, including the Separation of Powers, Open Courts, Equal Protection and Due Process provisions.

4. Notice

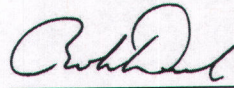
On **February 17, 2015**, copies of this Petition to Intervene were **hand delivered** to:

Director, Utah Division of Water Quality
150 North 1950 West
P.O. Box 14482
Salt Lake City, Utah 84114-4820

Administrative Proceedings Records Officer
Environment Division
Utah Attorney General's Office
195 North 1950 West, Second Floor
Salt Lake City Utah 84116

and served by mail, on:

Chris Hogle
Counsel for U.S. Oil Sands
Holland & Hart.
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Salt Lake City, UT 84101



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**BEFORE THE EXECUTIVE DIRECTOR
UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER QUALITY**

In the Matter of: U.S. Oil Sands PR Spring	:	
Mine, Mine Expansion and Ground Water	:	STATEMENT OF
Discharge Permit-by-Rule	:	STANDING
	:	
	:	February 17, 2015

Living Rivers hereby submits this Statement of Standing in the above captioned matter, which seeks review and remand of the decision by the Director of the Utah Division of Water Quality's (collectively "the Director") not to require U.S. Oil Sands (Oil Sands) to obtain a Ground Water Discharge Permit (GWDP) in response to the company's notification to the Director that it intends to significantly increase the size and scope, and substantially modify the footprint of its PR Spring mine. Further, Living Rivers seeks an order directing the Director to comply with and to properly apply the Utah Ground Water Quality Protection Regulations relative to the permit and to protect Waters of the State, including local ground water, surface water and the environment from contamination, from the discharge of pollutants and from any pollution resulting from the contamination of area ground water. The declaration of Mr. John Weisheit is attached to this Statement of Standing as Exhibit 1. Living Rivers does not believe it

is required to establish standing for it or its members. However, to the extent that this is deemed necessary and in further support of its Petition to Intervene, Living Rivers states:

I. Living Rivers Has Standing to Request Agency Action.

A. Living Rivers Satisfies the Traditional Standing Analysis.

Under the traditional standing rule, a party has standing to challenge governmental action when the challenged action gives rise to an injury to an established interest that attaches or implicates the party's personal stake in the dispute. More specifically, a party has a personal stake in the government action when it establishes: (1) "it has been or will be adversely affected by the [challenged] actions;" (2) "a causal relationship between the injury to the party, the [challenged] actions and the relief requested;" and (3) "the relief must be substantially likely to redress the injury claimed." *Sierra Club v. Utah Air Quality Board*, 2006 UT 74, ¶ 19, 148 P.3d 960 (internal quotations omitted).

1. The Expanded PR Spring Mine Will Adversely Impact Petitioners' Health and Recreational Interests.

Utah recognizes the ability of an environmental organization or "association" to bring suit on behalf of its staff and members, when the association's declarants "have identified personal adverse effects, sufficient causation, and redressability." *Sierra Club*, 2006 UT 74, ¶ 30. There is no threshold number of members who must qualify for standing in order for the group to represent the interests of its members. *Id.*, ¶ 34. To establish standing, plaintiffs must allege each of the elements of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). First, they must allege that: (1) they have or will suffer an "injury in fact" which is concrete and particularized; (2) the injury is "fairly traceable" to the challenged action of the defendant; and (3) it is "likely" that the injury will be redressed by a favorable decision. *Friends of Earth, Inc., v. Laidlaw Environmental Servs.*, 528 U.S. 167, 180 (2000).

Living Rivers and its staff and members have a personal stake in the proposed construction and operation of the expanded PR Spring mine because its staff and members will suffer distinct and palpable injuries as a result of these activities, and there is a “plausible connection” between their injuries and the permit (or lack of a permitting process and an individual GWDP) authorizing discharges from the proposed expansion, construction and operation. *See Sierra Club*, 2006 UT 74, ¶ 32. For example, Mr. Weisheit is the Conservation Director for Living Rivers and is a resident of Grand County near Moab, Utah. Weisheit Decl. ¶¶ 1-3. He is also the Colorado Riverkeeper. *Id.* at ¶ 3. Mr. Weisheit uses and enjoys the area in which the Oil Sands project will be constructed and operated. *Id.* at ¶ 6. He has visited the land encompassed by the permit-by-rule for the Oil Sands’ mine issued by the Director, as well as land adjacent to and nearby the mine. *Id.* at ¶¶ 6-7. He is concerned that, as a result of the construction and operation of expanded PR Spring mine, that seeps and springs located in Main Canyon below the mine will be immediately and irreparably harmed if the Director does not provide proper oversight of the expanded mining activities and these seeps and springs. *Id.* at 9.

Mr. Weisheit has visited the land and lands immediately adjacent to where the PR Spring mine is located. *Id.* at ¶ 7. He visits these lands to watch birds and wildlife, hike, enjoy the solitude and views, take photographs, and otherwise use and enjoy those lands. *Id.* Mr. Weisheit states that members of Living Rivers also use the land in the area of the mine for hunting, hiking and for spiritual and recreational purposes. *Id.* at ¶ 8. He contends that his recreation, aesthetic, spiritual, conservation and other interests will be significantly and adversely impacted if Oil Sands’ proposed expansion is allowed to proceed and the mine is allowed to operate. *Id.* at 9. He believes that the determination by the Director that the changes to the PR Spring mine will have a *de minimis* actual or potential effect on ground water quality and his decision not to

require Oil Sands to obtain a GWDP will degrade the environment and irreparably alter his use and enjoyment of the area near the mine. *Id.* at 10. Mr. Weisheit has also been harmed because he has been prohibited from participating in the permitting process that would lead to any decision whether or not to issue an individual GWDP for the mine expansion project. Mr. Weisheit states that his uses are totally incompatible with Oil Sands' proposed use of the area. *Id.* at 11. These concrete and particularized harms to Mr. Weisheit's health, his quality of life, and his aesthetic and recreational and procedural interests are sufficient to establish standing. *Sierra Club*, 2006 UT 74, ¶ 24 (injuries to health, property, and recreational activities show a particularized stake in the outcome sufficient to establish standing); Weisheit Decl. ¶¶ 3-13.

2. The Requested Relief Will Redress the Injuries.

Requiring the Director to undertake a permitting process and to compel Oil Sands to obtain a GWDP and to monitor area seeps and springs and to protect them from contamination from the mine and otherwise to require compliance with the Utah Water Quality Act and the Ground Water Quality Protection Regulations will redress Living Rivers' injuries described above. The applicable test is whether a favorable decision will "likely" redress the alleged injuries. *Laidlaw*, 528 U.S. at 181. In the present case, Living Rivers seeks to reduce or eliminate the environmental, recreational and aesthetic harms associated with the construction and operation of the expanded PR Spring mine – especially the potential harms caused by the impact of proposed mining activities on ground and surface water. Living Rivers seeks the following relief to remedy these harms, an order: 1) revoking Oil Sands' permit-by-rule for the mine expansion; 2) requiring a permitting process and that Oil Sands to obtain a Ground Water Discharge Permit; 3) requiring sufficient monitoring for and of potential discharges and adequate reclamation of the impacted area; 4) mandating compliance with ground water protection

standards and dictating that the Director's permitting decision be adequately based on the administrative record; and 5) requiring the Director to reduce the increase of or increased threat of pollution of the ground water and surface water by further limiting the discharge of pollutants associated with the construction and operation of the proposed expansion. This relief is available to Living Rivers under the Utah Water Quality Act and/or Utah's Ground Water Protection Standards.

If any of the relief sought by Living Rivers is granted, the concrete and particularized harms to it and its staff and members' health, quality of life, and aesthetic and recreational interests will be redressed by providing a permitting process in which the organization may participate and may endeavor to protect its interests and by either preventing or reducing the pollution being discharged by the mine, or ensuring that any pollutants being discharged by the mine are properly monitored, accounted for and understood. Because the harms alleged by the staff and members of Living Rivers will likely be redressed by a favorable decision, Living Rivers has standing to bring this Petition.

B. Petitioners Also Has Standing under the Alternative Standing Analysis.

Because Living Rivers satisfies the traditional standing test, this tribunal need not inquire further. *Sierra Club*, 2006 UT 74, ¶ 41. Nevertheless, Living Rivers also satisfies the alternative standing requirements because it is the appropriate party raising issues of significant public importance that are unlikely to be raised if they are denied standing. *Id.*; see *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 17, 233 P.3d 461 (holding that parties who can "effectively assist the court in developing and reviewing all relevant legal and factual questions" and who will raise litigate issues that are unlikely to be raised if they are denied standing satisfy the alternative standing test); *Magna Water Co. v. Strawberry Water Users*

Ass'n, 2012 UT App 184, ¶ 12, 285 P.3d 1. Living Rivers is an appropriate party. *Sierra Club*, 2006 UT 74, ¶ 42.

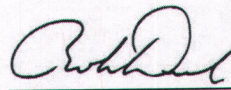
Living Rivers is an appropriate party because it is dedicated to the preservation, protection and restoration of rivers and watersheds in the Colorado Plateau. Weisheit Decl. at ¶ 4. Living Rivers works to ensure the long-term health and viability of human, animal and plant species, as well as environmental quality, threatened by mining operations in the region. *Id.*

Living Rivers has the experience and interest in helping to develop and review the factual and legal issues arising from the proposed expansion and the permitting of discharges from the expansion. Furthermore, the public health and environmental issues associated with the proposed expansion are unlikely to be raised if Living Rivers is denied standing because there are no other parties challenging the lack of permitting process or lack of a GWDP for the mine and there is no other forum readily available to challenge whether the lack of a GWDP complies with the Utah Water Quality Act and the Ground Water Quality Protection Regulations. *See Magna Water Co.*, 2012 UT App 184, ¶ 15 (lack of any other parties who filed a timely objection indicated that the issues raised by the litigation were unlikely to be raised if they were denied standing).

Finally, the issues that Living Rivers seeks to raise are issues of significant public importance. The PR Spring mine is the first “commercial scale” tar sands mine permitted in the United States. The organization seeks review of the Director’s decision not to undertake a permitting process and not to require Oil Sands to obtain a GWDP for the expansion. Living Rivers asserts that the current permit-by-rule does not comply with all the requirements set forth in the Utah Water Quality Act and the Ground Water Quality Protection Regulations. The legal protections sought by Living Rivers reverberate throughout the Colorado Plateau because of the

project's potential long-term and short-term impacts to the water resources within the Colorado River watershed. Therefore Oil Sands' compliance with the Utah Water Quality Act and the Ground Water Quality Protection Regulations has significant public importance. *See Sierra Club*, 2006 UT 74, ¶ 44. Because water quality of the Colorado River watershed is an issue of public importance, to ensure compliance "it is important to give the opportunity to be heard to those persons who will be directly affected by the alleged violations of state and federal law." *Id.* Thus, as Living Rivers is an appropriate party to raise issues of public significance that are unlikely to be raised otherwise, it satisfies the alternative standing test.

Respectfully submitted this 17th day of February, 2015.



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Exhibit 1

DECLARATION OF JOHN WEISHEIT

I, John Weisheit, based upon my personal knowledge and belief, state:

1. I reside in Grand County near Moab, Utah.
2. I am of sound mind and body and competent to make this Declaration.
3. I am the Conservation Director of Living Rivers and the Colorado Riverkeeper, an affiliate of the Waterkeeper Alliance.
4. Living Rivers is a non-profit corporation headquartered in Moab, Utah, dedicated to the preservation, protection, and restoration of rivers and watersheds in the Colorado Plateau. Living Rivers works to insure the long-term health and viability of human, animal and plant species, as well as environmental quality, threatened by mining operations in the region.
5. In my capacity as Living Rivers' Conservation Director, I received notice of U.S. Oil Sands, Inc.'s November 21, 2014 revision to its Notice of Intention to Commence Large Mining Operations (NOI) at PR Spring, submitted to the Division of Oil, Gas & Mining (DOGM). After consulting with our attorney, I became aware that the Chief of the Ground Water Section of the Utah Division of Water Quality (DWQ) stated that he was aware of the revision that U.S. Oil Sands submitted to DOGM, but that DWQ will not require the company to submit an application for a ground water discharge permit because DWQ determined that the changes in the mine layout contained within the revision do not change the agency's permit by rule determination. DWQ's determination and decision were reached without public notice and comment.
6. I use and enjoy the land where U.S. Oil Sands' project is proposed. I also use and enjoy the lands adjacent to and nearby the proposed project land.
7. I have visited the land where DWQ has issued its permit-by-rule for U.S. Oil Sands mining operations, and the lands immediately adjacent and nearby. I visit those lands to watch birds and wildlife, hike, enjoy the solitude and views, take photographs, and otherwise use and enjoy the public lands in this area.
8. Living Rivers' members also use the land in the area for hunting, hiking, spiritual, and recreation purposes.
9. My recreation, aesthetic, spiritual, conservation and other interests will be significantly and adversely affected if the ground water discharges associated with U.S. Oil Sands' proposed changes are allowed to proceed without DWQ requiring the company to obtain a ground water discharge permit that requires proper monitoring of the seeps and springs located near

the mine, especially those seeps and springs in Main Canyon below the mine. My uses and interests will be immediately and irreparably harmed if U.S. Oil Sands enacts these changes without having obtained a ground water discharge permit from DWQ, and without DWQ providing proper oversight of possible impacts from the mine on area seeps and springs.

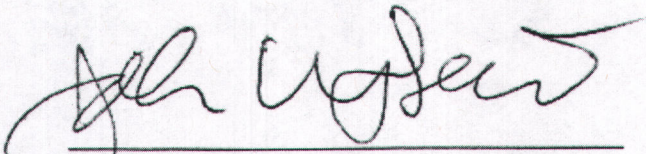
10. The determination by DWQ that these changes to the PR Spring mine will have a *de minimis* actual or potential effect on ground water quality and its decision not to require U.S. Oil Sands to obtain a ground water discharge permit will degrade the environment and irreparably alter my use and enjoyment of the area described above.

11. My uses are totally incompatible with U.S. Oil Sands' proposed impacts through its mining operations, including impairment of ground water resources and the subsequent impairment of downstream uses of surface manifestations of that groundwater.

12. I have visited and have used the lands at and near the PR Spring mine several times within the last year and intend to visit and use that area for the aforementioned purposes at least three times in the next year.

13. The only way to protect my interest and uses of the proposed project area and other lands and water affected by the project, and to protect the similar interests and uses of Living Rivers' members, from irreparable harm is for the Utah Department of Environmental Quality Executive Director to vacate DWQ's permit-by-rule decision and remand the decision not to require the company to obtain a ground water discharge permit that requires substantial monitoring of area seeps and springs to determine if discharges from the mine will harm those seeps and springs.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my personal knowledge, information and belief.


John Weisheit

2/11/15
Date